No. 93-404 (14)

In The

Supreme Court of the United States

October Term, 1994

ARTHUR L. GUSTAFSON, DANIEL R. McLEAN
and FRANCIS I. BUTLER,

Petitioners,

v.

ALLOYD CO., INC. and
WIND POINT PARTNERS II, L.P.,

Respondents.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

**SUPPLEMENTAL BRIEF OF RESPONDENTS
ALLOYD CO., INC. AND
WIND POINT PARTNERS II, L.P.**

ROBERT J. KOPECKY*
BRIAN D. SIEVE
CAROLE A. CHENEY
JONATHAN F. PUTNAM
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

KENNETH W. STARR
PAUL T. CAPPUCCIO
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Counsel for Respondents

October 11, 1994 *Counsel of Record

20pp

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

SUPPLEMENTAL QUESTION PRESENTED

Does section 12(2) of the Securities Act of 1933 apply to secondary transactions as well as initial offerings of securities?

TABLE OF CONTENTS

Page

SUPPLEMENTAL QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

SUMMARY OF ARGUMENT 1

ARGUMENT 1

I. The Language And Structure Of The Statute Demonstrate That Section 12(2) Applies To Both Initial And Secondary Sales Of Securities 1

A. The Text Of The Statute Does Not Limit Section 12(2) To Initial Offerings 2

B. The Structure Of The 1933 Act Confirms That Section 12(2) Is Not Limited To Initial Offerings 4

II. The Legislative History Of The 1933 Act Does Not Support Construing Section 12(2) As Limited To Initial Offerings 6

III. Limiting Section 12(2) To Initial Offerings Is Inconsistent With The Remedial Purpose Of The Act And Is Not Required By Any Compelling Policy Concerns 10

IV. The Transaction In This Case Had The Characteristics Of An Offering By The Issuer 12

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Ardestani v. INS, 112 S. Ct. 515 (1991) 6

Ballay v. Legg Mason Wood Walker, Inc., 925 F.2d 682 (3d Cir.), *cert. denied*, 112 S. Ct. 79 (1991) 2, 3, 4, 5, 13, 14

First Union Discount Brokerage Services, Inc. v. Milos, 997 F.2d 835 (11th Cir. 1993) 3

Gould v. Ruefenacht, 471 U.S. 701 (1985) 2

Klein v. Computer Devices, Inc., 591 F. Supp. 270 (S.D.N.Y. 1984) 5

Landreth Timber Co. v. Landreth, 471 U.S. 681 (1985) 7

National Organization for Women, Inc. v. Scheidler, 114 S. Ct. 798 (1994) 6

Pacific Dunlop Holdings, Inc. v. Allen & Co., 993 F.2d 578 (7th Cir. 1993), *cert. granted*, 114 S. Ct. 907, *cert. dismissed*, 114 S. Ct. 1146 (1994) 3, 4, 10

Pinter v. Dahl, 486 U.S 622 (1988) 9, 11

Randall v. Loftsgaarden, 478 U.S. 647 (1986) 6

SEC v. Ralston Purina Co., 346 U.S. 119 (1953) 8

United States v. Naftalin, 441 U.S. 768 (1979) 6

Wilko v. Swan, 127 F. Supp. 55 (S.D.N.Y. 1955) 9

STATUTES AND REGULATIONS

15 U.S.C. § 77b(3) 2

15 U.S.C. § 77b(4) 2

TABLE OF AUTHORITIES – Continued

Page

15 U.S.C. § 77b(10) 3, 10

15 U.S.C. § 77c(a)(1) 2

15 U.S.C. § 77d(1) 2

15 U.S.C. § 77d(6) 2

15 U.S.C. § 77e(a)(1) 4

15 U.S.C. § 77j 3

15 U.S.C. § 77k(a) 5

15 U.S.C. § 77k(b) 2

15 U.S.C. § 77l 2

15 U.S.C. § 77l(1) 5

17 C.F.R. § 230.139 10

17 C.F.R. § 230.144(3) 5

OTHER AUTHORITIES

Black's Law Dictionary (6th ed. 1990) 1

78 Cong. Rec. 8105 8

78 Cong. Rec. 8666 8

Dean, The Federal Securities Act: I, 8 Fortune 50 (1933) 8

Fisher, Parsing *Pinter* Four Years Later: Defining a Statutory Seller Under Section 12 of the Securities Act, 21 Sec. Reg. L.J. 46 (1993) 11

Frankfurter, The Federal Securities Act: II, 8 Fortune 53 (1933) 8

H.R. Conf. Rep. No. 152, 73d Cong., 1st Sess. (1933) 7

TABLE OF AUTHORITIES – Continued

Page

H.R. Rep. No. 85, 73d Cong., 1st Sess. 5 (1933) 7, 12

C. Johnson, Corporate Finance and the Securities Laws (1990) 5

3 L. Loss & J. Seligman, Securities Regulation (3d ed. 1989) 5

9 L. Loss & J. Seligman, Securities Regulation (3d ed. 1992) 5, 6

Prentice, Section 12(2): A Remedy for Wrongs in the Secondary Market?, 55 Albany L. Rev. 97 (1991) 7

S. Rep. No. 875, 73d Cong., 1st Sess. (1933) 7

SEC Release No. 33-2623, 11 Fed. Reg. 10964 (July 25, 1941) 3

SUMMARY OF ARGUMENT

Section 12(2) does not expressly limit its civil remedy to "initial offerings" of securities, which are commonly understood to be sales by issuers. The term "prospectus," as used in section 12(2), is defined broadly and is not limited to statements made in connection with initial offerings. The other key provisions of the Act, sections 5, 11, 12(1) and 17, all apply, in varying degrees, to secondary offerings. The legislative history contains no unambiguous evidence of a legislative intent to restrict the civil remedy provided by section 12(2) to initial offerings. Moreover, one of the principal remedial purposes of the Act would be thwarted by excluding secondary sales from the scope of section 12(2), and there is no strong countervailing policy reason for construing the section narrowly. Finally, even if section 12(2) were construed as applying to less than the full array of secondary transactions, it should apply to sales by controlling shareholders of the issuer, such as the sale by petitioners in this case.

ARGUMENT

I. The Language And Structure Of The Statute Demonstrate That Section 12(2) Applies To Both Initial And Secondary Sales Of Securities.

The 1933 Act neither defines nor employs the terms "initial" offering or "secondary" sale. As reflected in the *amicus* briefs of the Solicitor General and the Securities Industry Association ("SIA"), however, these terms have well-settled meanings. An "initial offering" is generally understood to be a sale of securities by the issuer, while a "secondary" sale is a subsequent transaction by any other person or entity.[1] (*See* SEC Br. 5-6 n.5; SIA Br. 2 n.2) The

[1] *Black's Law Dictionary* contains similar definitions of the two categories of offerings. "Securities offerings are generally of two types: primary (proceeds going to the company for some lawful purpose) and secondary (where the funds go to a person other than the company; *i.e.*, selling stockholders)." *Black's Law Dictionary* 1082 (6th ed. 1990).

absence of these or any similar terms from the Act indicates that Congress did not intend to draw any distinction between initial and secondary securities transactions. As discussed below, neither the text nor the structure of the Act supports limiting section 12(2) to the narrow category of initial offerings.

A. The Text Of The Statute Does Not Limit Section 12(2) To Initial Offerings.

The text of section 12(2) squarely contradicts the argument that the civil remedy applies only to initial offerings of securities – that is, offerings *by issuers*. Congress defined the term "issuer" in the 1933 Act, *see* 15 U.S.C. § 77b(4), and used the term repeatedly throughout the Act in specifying the obligations, exemptions and remedies under the Act. *See, e.g.*, *id.* §§ 77c(a)(1), 77d(1), 77d(6), 77k(b). Section 12(2), however, contains no language limiting its application to sales by "issuers." To the contrary, section 12(2) provides a civil remedy against "*[a]ny person*" who offers or sells a security through a misleading prospectus or oral statement. *Id.* § 77l (emphasis added).

The breadth of section 12(2) is confirmed by section 2(3), which defines "sale" and "sell" broadly to include "*every* contract of sale or disposition of a security." *Id.* § 77b(3) (emphasis added). And this Court held in *Gould v. Ruefenacht*, 471 U.S. 701 (1985), that the "securities" covered by section 12(2) include those sold in a privately-negotiated resale of a corporation's stock. Thus, the operative transactional terms in section 12(2) encompass both initial and secondary sales of securities.

The leading decision limiting section 12(2) to initial offerings, *Ballay v. Legg Mason Wood Walker, Inc.*, 925 F.2d 682 (3d Cir.), *cert. denied*, 112 S. Ct. 79 (1991), ignores these broad, all-inclusive terms. The court in *Ballay* instead focused exclusively on the phrase "by means of a prospectus or oral communication," which it read as limiting section 12(2) to "the sale of a security in an initial distribution." *Id.* at 688. The court concluded that "the plain meaning of the words 'prospectus or oral communication' together is that buyers may recover for material misrepresentations made in a prospectus or in an oral communication related to a prospectus or initial offering." *Id.* The court did not explain how the "plain meaning" of the various terms used by Congress in the definition of "prospectus" supports limiting section 12(2) to initial offerings.[2]

The terms used in defining "prospectus" include any "notice, circular, advertisement, letter, or communication" offering a security for sale. 15 U.S.C. § 77b(10). Neither these terms nor the term "oral communication" connotes a limitation to offerings by issuers, as opposed to sales by other owners of securities. As the court noted in *Pacific Dunlop Holdings, Inc. v. Allen & Co.*, 993 F.2d 578, 582, 588 (7th Cir. 1993), section 2(10) defines prospectus "very broadly," and the key determinant of a prospectus is "whether the substance of the words used offers to sell or confirm[s] the sale of a security."

Nor does the use of the term "prospectus" in section 10 of the Act, 15 U.S.C. § 77j, support limiting section 12(2) to initial offerings, as asserted by the court in *Ballay*. 925 F.2d at 688-89. Section 10 sets forth the information required in a particular kind of prospectus – one issued in conjunction with a registration statement. The SEC has long recognized the distinction between a "formal prospectus" meeting the criteria of section 10 and the broader category of prospectus defined in section 2(10). SEC Release No. 33-2623, 11 Fed. Reg.

[2] The Eleventh Circuit's decision in *First Union Discount Brokerage Services, Inc. v. Milos*, 997 F.2d 835 (11th Cir. 1993), adds nothing to the analysis of this issue. First, the court in *First Union* did no independent analysis of the initial/secondary issue, but rather adopted the *Ballay* court's analysis. Second, the case did not involve any secondary sale to Milos "by means of a prospectus or oral communication" containing misrepresentations about any securities. Rather, the case involved a liquidation of Milos's margin account by his discount broker, and the section 12(2) claim was therefore apparently not based on any purchase of securities by him. *Id.* at 840.

10964 (July 25, 1941); *see* Resp. Br. 23 n.17; SEC Br. 10-11. Nothing in the text of section 12(2), or elsewhere in the Act, indicates Congress intended to limit "prospectus" as used in section 12(2) to the "formal" section 10 prospectus.[3]

In sum, the text of section 12(2) simply cannot be read as limiting its civil remedy to sales by issuers or sales of newly issued shares. The only word in section 12(2) relied upon by advocates for limiting the section to initial offerings – "prospectus" – cannot support such a limitation because Congress defined the term using words that are not limited to the context of initial offerings. (*See* Resp. Br. 20-24) To read section 12(2) as limited to initial offerings would require ignoring the words Congress used, as well as those it elected not to use, in drafting the provision.

B. The Structure Of The 1933 Act Confirms That Section 12(2) Is Not Limited To Initial Offerings.

The other provisions of the 1933 Act confirm that section 12(2) is not limited to initial offerings. Contrary to the opinion in *Ballay*, 925 F.2d at 691, the registration requirement of section 5 and the remedial provisions of sections 11 and 12(1) all apply to secondary transactions as well as initial offerings.

Section 5 provides that, "[u]nless a registration statement is in effect as to a security, it shall be unlawful for any person" to sell such security "through the use or medium of any prospectus or otherwise." 15 U.S.C. § 77e(a)(1). While section 4(1) of the Act exempts from registration "transactions by any person other than an issuer, underwriter, or dealer," a broad range of secondary sales remain subject to the registration requirement. For example, if a shareholder of a corporation decides to sell his shares through an underwriter, registration is required under section 5 because sales by

[3] In *Pacific Dunlop*, the Seventh Circuit also thoroughly analyzed whether the "context" of the Act requires a different definition of prospectus in section 12(2) than that contained in section 2(10). 993 F.2d at 584-88. After examining the structure and text of the Act, the court concluded that nothing in the statutory context requires a definition of prospectus in section 12(2) "contrary to the broad definition of section 2(10)." 993 F.2d at 588.

an underwriter are not exempted under section 4. *See, e.g.*, C. Johnson, *Corporate Finance and the Securities Laws* 10 (1990). Similarly, a "control person" who sells "restricted securities," except under the narrow circumstances prescribed in SEC Rule 144, will be deemed to be engaged in a "distribution" and thus required to register his or her shares.[4] *Id.* at 14; *see* 3 L. Loss & J. Seligman, *Securities Regulation* 1507 (3d ed. 1989).

Section 12(1) provides a civil remedy against "[a]ny person" who "offers or sells a security in violation of section 77e." 15 U.S.C. § 77l(1). Thus, any secondary offering that must be registered under section 5, if consummated without a registration statement, will subject the seller to the civil remedy in section 12(1).

Section 11, which provides civil remedies for material misrepresentations or omissions in any registration statement, similarly extends beyond initial offerings. A purchaser of securities has a remedy under section 11 for misrepresentations in a registration statement for a secondary offering of restricted securities by a control person or a secondary distribution through an underwriter. Moreover, section 11 contains no privity requirement; it creates a right of action for any person who acquires securities covered by a false or misleading registration statement. 15 U.S.C. § 77k(a). Section 11 therefore provides a civil remedy not only for those persons who purchased directly on the offering, but also for those who subsequently purchase in the after-market and can trace the particular shares they purchase to the registration statement. *See, e.g., Klein v. Computer Devices, Inc.*, 591 F. Supp. 270, 273 n.7 (S.D.N.Y. 1984); 9 L. Loss & J. Seligman, *Securities Regulation* 4267 (3d ed. 1992).

Thus, both *Ballay* and *amicus* SIA are wrong in asserting that section 12(2) must be limited to initial offerings in order to be consistent with sections 11 and 12(1). Even if section 12(2) were read in the narrowest possible way as co-extensive

[4] As defined in Rule 144, "restricted securities" include those acquired directly or indirectly from an issuer or its affiliates in any transaction not involving a public offering. 17 C.F.R. § 230.144(3).

with sections 11 and 12(1), it still would apply to numerous secondary transactions.

Furthermore, as explained more fully in Buyers' principal brief, section 12(2) is *not* limited to those transactions covered by sections 11 and 12(1). For example, section 3 exempts various types of securities from the registration requirements of the Act, but section 12(2) expressly states that sales of such securities are not exempt from the civil remedies for misrepresentation. Similarly, section 4 exempts certain transactions from the registration requirement, but the exemption is limited by its terms to section 5. *See* 9 L. Loss & J. Seligman, *Securities Regulation* 4198 (3d ed. 1992) (section 12(2) "applies to all sales of securities, whether or not registered and whether or not the particular security or transaction is exempted from § 5").

Finally, it is well settled that the criminal anti-fraud provision in section 17 of the Act is not limited to initial offerings. As this Court stated in *United States v. Naftalin*, 441 U.S. 768, 777-78 (1979), section 17 "was intended to cover any fraudulent scheme in an offer or sale of securities, whether in the course of an initial distribution or in the course of ordinary market trading." Since section 12(2) similarly addresses misrepresentations in connection with sales of securities, it should also be applied to secondary sales.

II. The Legislative History Of The 1933 Act Does Not Support Construing Section 12(2) As Limited To Initial Offerings.

The language of a statute is presumed to express the intent of Congress. *See Ardestani v. INS*, 112 S. Ct. 515, 520 (1991). Where, as here, the scope of a statute can be determined by analyzing its language and structure, only the clearest legislative history would justify reaching a different result. *See, e.g., National Organization for Women, Inc. v. Scheidler*, 114 S. Ct. 798, 806 (1994). No such clear legislative intent exists in this case.

This Court has previously observed that the legislative history of section 12(2) is "sparse," *Randall v. Loftsgaarden*,

478 U.S. 647, 657 (1986), and even an ardent advocate for construing section 12(2) narrowly has acknowledged that the provision "was never separately analyzed and was only occasionally mentioned in the legislative history." Prentice, *Section 12(2): A Remedy for Wrongs in the Secondary Market?*, 55 Albany L. Rev. 97, 107 (1991). Nothing in the House Report (H.R. Rep. No. 85), the Senate Report (S. Rep. No. 875), or the Conference Report (H.R. Conf. Rep. No. 152) states that section 12(2) is limited to initial offerings. Nor is there any statement in the legislative history that Congress intended the word "prospectus" to limit section 12(2) to initial offerings. At bottom, the legislative history is simply silent on this point.[5]

Unable to cite anything in the legislative history specifically supporting a constricted reading of section 12(2), both Sellers and SIA rely on general statements by Members of Congress, as well as snippets from the House Report, indicating that the primary focus of the Act was initial offerings. (*See, e.g.*, Pet. Br. 23 n.8, 34-36; SIA Br. 14-16) While Buyers concede that statements in the House Report, as well as comments by several members of Congress, suggest the principal focus of the Act was initial offerings, that view was not universal. There was certainly no consensus for the proposition that the Act excludes secondary sales from the civil remedies for misrepresentation. Some Members of Congress, as well as leading commentators, expressed the contemporaneous view that the 1933 Act covers both initial and secondary offerings.

During debates on the Securities Exchange Act in May 1934, for example, Senator Kean provided a detailed

[5] Of course, one cannot infer from this silence that Congress intended to exclude secondary transactions from the scope of section 12(2). *See Landreth Timber Co. v. Landreth*, 471 U.S. 681, 696 n.7 (1985). As the Court explained in *Landreth*, the courts and the SEC have applied the 1933 and 1934 Acts to a variety of transactions as to which the legislative history is silent. *Id.*

comparison of the 1933 Act with the British Companies Act of 1929.[6] 78 Cong. Rec. 8666, 8674-8696 (May 12, 1934). That comparison explained that "[t]he United States act covers original *and subsequent transactions* in securities; the British act deals chiefly with the original offer of securities to the public and not to subsequent transactions in those securities." *Id.* at 8674 (emphasis added); *see also id.* at 8676 ("United States act applies (disregarding the exceptions) to all transactions in all securities"). Similarly, during the House debates on an early version of the Exchange Act (H.R. 9323), Congressman Mapes explained that the 1933 Act "was based upon the theory that *anyone* who made a false representation to an innocent investor should reimburse the innocent investor whatever he suffered because of that false representation." 78 Cong. Rec. 8105 (emphasis added).

The individuals principally involved in drafting the 1933 Act also expressed the contemporaneous view that section 12(2) applies to secondary transactions. For example, Arthur Dean, who consulted with the House Commerce Committee during the drafting process, and then-professor Felix Frankfurter, the head of the team that drafted the Act, both wrote in 1933 that section 12(2) applies to secondary transactions. *See* Dean, *The Federal Securities Act: I*, 8 Fortune 50, 102 (1933); Frankfurter, *The Federal Securities Act: II*, 8 Fortune 53, 108 (1933). As explained in Buyers' principal brief, that view was echoed even by early critics of the Act. (*See* Resp. Br. 46-47) And with few exceptions, leading commentators, including Professor Loss, have consistently said that section 12(2) is not limited to initial distributions. (*Id.* at 47 n.36)

In sum, nothing in legislative history of section 12(2) expressly reflects a legislative intent to limit the civil remedy in that section to initial offerings. Collectively, comments by individual Members of Congress regarding the scope of the

---

[6] This Court has noted previously that the British Companies Act was the "statutory antecedent" of the federal securities laws. *SEC v. Ralston Purina Co.*, 346 U.S. 119, 123 (1953).

Act are, at best, ambiguous. Accordingly, the legislative history does not justify departing from the plain language of the statute.

III. Limiting Section 12(2) To Initial Offerings Is Inconsistent With The Remedial Purpose Of The Act And Is Not Required By Any Compelling Policy Concerns.

Application of section 12(2) to secondary sales of securities furthers the purposes of the Act by addressing one of the principal goals Congress sought to achieve. In holding that the term "seller" should be construed broadly for purposes of section 12(1), this Court explained in *Pinter* that such a construction "furthers the purposes of the Securities Act – to promote full *and fair* disclosure of information to the public in the sales of securities." *Pinter v. Dahl*, 486 U.S. 622, 646 (1988) (emphasis added). The Court did not suggest that this remedial purpose was limited to initial offerings. To the contrary, misrepresentations can occur just as readily – and are just as invidious – in secondary sales of securities. There is no sound basis in the policy underlying the Act to construe section 12(2) as limited to initial offerings.[7]

A number of examples illustrates this point. If a controlling shareholder of a corporation decided that the corporation should issue new shares of stock and sold them in a registered offering, this "initial offering" would clearly come within section 12(2). If the same shareholder decided instead to resell a portion of his holdings, and did so through an underwriter in a public offering, this "secondary sale" would not be covered by section 12(2) under a construction limited to initial offerings. Similarly, if this controlling shareholder sold his shares in a private placement, the buyers would have no

---

[7] This policy analysis informed the early decisions holding that section 12(2) applies to both initial and secondary offerings. *See, e.g., Wilko v Swan*, 127 F. Supp. 55, 59 (S.D.N.Y. 1955) (noting that limiting section 12(2) to initial distributions "would frustrate the remedial purposes of the statute and lead to absurd and wholly incongruous results").

claim under section 12(2) even if the sale occurred by means of an offering circular that was identical, word-for-word, to the prospectus used in connection with an initial offering by the corporation. This result cannot be squared with the remedial purpose of the statute. There is no sound reason for giving buyers a remedy for misrepresentations contained in the written materials used by the issuer to sell stock, but not for the same misrepresentations made by the corporation's controlling shareholders in a secondary sale.

SIA urges that section 12(2) must be limited to initial offerings by issuers because broader application would have a devastating impact on dissemination of research reports prepared by securities analysts. (SIA Br. 18-24) The concerns raised by SIA are ill-founded and do not justify a reading of section 12(2) at odds with the text and structure of the Act. SIA's argument rests on a faulty premise – that the construction of section 12(2) adopted by the Seventh Circuit in *Pacific Dunlop* will result in open-ended liability for firms that prepare research reports on publicly-traded securities. There are at least two formidable statutory barriers to a potential suit based on an analyst's research report, both of which belie the calamitous result predicted by the SIA.

First, SIA misreads *Pacific Dunlop* as holding that a "prospectus" for purposes of section 12(2) includes "*any* document connected with the sale of a security." (SIA Br. 8, emphasis added) As *Pacific Dunlop* recognized, section 2(10) defines "prospectus" as a communication that "offers any security for sale or confirms the sale of any security." 15 U.S.C. § 77b(10). Research reports generally do not offer securities for sale.[8] Thus, a research report, even if riddled with factual errors, would not give rise to a claim under

[8] Analysts' reports invariably contain a legend stating that the report "is not an offer to buy or sell or a solicitation of an offer to buy or sell" the securities. The SEC has also addressed this issue under its rule-making power. Rule 139 prescribes the circumstances in which a research report on securities of an issuer will not be deemed an "offer to sell" the securities, and thus will not constitute a "prospectus" under section 2(10), even though the firm issuing the report is involved in a distribution of such securities. 17 C.F.R. § 230.139.

section 12(2) because it does not come within the definition of "prospectus."

Second, a plaintiff seeking to assert a claim against the firm that publishes a research report would have to establish that the firm is a "seller" subject to section 12(2). This Court has never addressed the scope of a statutory seller for purposes of section 12(2), although in *Pinter* it did construe the term as used in section 12(1). 486 U.S. at 641-54. In *Pinter*, the Court held that a statutory seller is one who either passes title to the securities or "successfully solicits the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner." *Id.* at 647.

Assuming that this same definition applies to section 12(2), the publisher of a research report could be liable only if it was found to have "successfully solicited" the sale of the securities at issue. A growing body of case law supports the proposition that a "soliciting seller" must have some direct or personal contact with the purchaser. *See* Fisher, *Parsing* Pinter *Four Years Later: Defining a Statutory Seller Under Section 12 of the Securities Act*, 21 Sec. Reg. L.J. 46, 58 & n.41 (1993) (citing cases). It is not at all clear that a firm publishing a research report could be liable under section 12(2) unless it also used that report in personally and actively soliciting a customer to purchase the securities covered by the report.[9]

Finally, construing section 12(2) to apply only to some, but not all, secondary transactions necessarily involves writing into the statute a limitation that is not there. This kind of legislative line-drawing, which entails careful balancing of

[9] SIA also argues that securities analysts would be required "to investigate every conceivable fact regarding a company" if they are subject to section 12(2) liability. (SIA Br. 23) This is again an overblown concern since section 12(2) does not impose liability for pure omissions. Section 12(2) creates liability only for affirmative misstatements by a seller or for omission of facts that make the seller's statements misleading. There is no sound policy reason why a broker who negligently makes a misstatement of fact to a purchaser of securities should escape liability simply because the transaction was a secondary sale rather than an initial offering.

the various interests to be served by the statute, is uniquely the function of Congress.

IV. The Transaction In This Case Had The Characteristics Of An Offering By The Issuer.

To decide this case, the Court need not decide the extent to which section 12(2) applies to all the participants involved in typical sales of securities on organized securities exchanges. Nor must the Court decide whether, and under what circumstances, section 12(2) applies to analysts' research reports and similar materials published by those engaged in the securities business. These issues are not presented by the facts of this case and their resolution is not essential to the decision here.

The only "initial/secondary" issue presented by this case is whether a sale of a corporation's securities through oral and written representations made by those in control of the corporation is a transaction covered by section 12(2). Even the legislative history frequently cited in support of a narrow reading of section 12(2) confirms that Congress intended the Act to apply to secondary transactions having the basic attributes of an "initial offering." The House Report on an earlier version of the Act explained that, as then drafted, the bill "does not affect the ordinary redistribution of securities *unless such redistribution takes on the characteristics of a new offering by reason of the control of the issuer possessed by those responsible for the offering*." H.R. Rep. No. 85, 73d Cong., 1st Sess. 5 (1933) (emphasis added).

The sale of Sellers' stock in this case had the key characteristics of an "initial offering." The Alloyd board of directors passed a resolution directing that "*the Company* actively solicit bids for the purchase of all of the outstanding stock of the Company." (R. 56, Dep. Ex. 3 at 1; emphasis added) An investment banker was retained "on behalf of the Company and its shareholders" to solicit offers. (*Id.*) That firm prepared and circulated to potential purchasers a "Profile" that was designed to, and did, generate offers for Sellers' stock. (R.

56, Dep. Exs. 2 and 5; McLean Dep. 132; Gustafson Dep. 72-73)

Sellers owned 100% of the stock of Alloyd, held the three most senior management positions in the company, and comprised a majority of the board of directors. All of the key financial information provided to Buyers came from Sellers or their agents. In these circumstances, Sellers were for all practical purposes indistinguishable from the issuer of the stock of Alloyd. Accordingly, section 12(2) should apply to *this* transaction even if the Court concludes that the section does not apply to all secondary market transactions.[10]

The reasoning of the Third Circuit in *Ballay* supports this result. The *Ballay* court concluded there was "good reason" to provide a rescissionary remedy in connection with initial offerings because "sellers receive the full purchase price from the investors and are the investors' sole source of information concerning the value of the security." 925 F.2d at 693. The court contrasted this situation with "sellers in the aftermarket, such as [brokers], who receive only a commission and who are not the investors' sole source of information concerning the value of the stock." *Id.* Here, unlike the transaction in *Ballay*, the proceeds of the sale went to Sellers, and Sellers were Buyers' primary source of information concerning Alloyd.

Similarly, the *Ballay* court reasoned that the rescissionary remedy under section 12(2) was appropriate in the context of initial offerings because misrepresentations in such offerings "can influence the purchase price of securities." *Id.* Under these circumstances, the court explained, "rescissionary damages are appropriate to make an investor whole and deter any negligence on the part of a seller of batch offerings." *Id.* The court found such a remedy inappropriate where misrepresentation by a broker in the secondary market "is less

[10] The district court, ignoring these undisputed facts, found that Buyers had failed to provide evidence that the transaction in this case "possesses the characteristics of a new offering." (J.A. 20-21) In reaching this conclusion, the court erroneously relied on the irrelevant fact that Alloyd was formed some 30 years before Sellers' disposition of their shares. (J.A. 21)

likely to affect the price of a security and so should not be so heavily penalized." *Id.* Here, once again, the transaction falls within the category for which *Ballay* found application of section 12(2) warranted because the information provided by Sellers was the key determinant of the price paid by Buyers for the Alloyd stock. (*See, e.g.*, R. 56, Kracum Dep. 55-56)[11]

CONCLUSION

For the reasons stated above, section 12(2) is not limited to initial offerings of securities, and the judgment of the court of appeals should be affirmed.

Respectfully submitted,

ROBERT J. KOPECKY*
BRIAN D. SIEVE
CAROLE A. CHENEY
JONATHAN F. PUTNAM
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

KENNETH W. STARR
PAUL T. CAPPUCCIO
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Counsel for Respondents

October 11, 1994

*Counsel of Record

[11] Respondent Wind Point calculated the purchase price based on a multiple of 7.5 times Alloyd's earnings before interest and taxes. (R. 56, Kracum Dep. 112, 115-16) This earnings figure, in turn, was based directly on the interim financial information provided by Sellers, which is the basis for Buyers' misrepresentation claim.